130—229

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 183.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CLINTON H. EMERSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 26, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 30, 1888.

1 *Declaration. Filed Sep.* 30, 1882.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } Law. No. 23948.

The plaintiff sues the defendant, a municipal corporation created by law, for that whereas the defendant as such municipality was, on the 4th day of February, 1882, and for many years prior thereto had been, and has ever since been and now is, charged by law, among other things, with the duty of keeping or causing the sidewalks of the city of Washington to be kept in good order and condition so that all citizens of the said District and all others having occasion thereto might safely traverse and pass on foot upon said sidewalks without the hazard of injury to life or limb by reason of said sidewalks being out of repair or in unsafe condition; yet, notwithstanding the said duty and obligation on the part of the defendant, on the said fourth day of February, 1882, and for a long time prior thereto, the defendant wrongfully and negligently permitted the sidewalk in front of building No. 1219, on the north side of F St. N. W., between 12th and 13th Sts., to be in an unsafe and dangerous condition for pedestrians to pass over it on account of a depression in said sidewalk to the depth of about six inches below the surface of the grade of said sidewalk, said depression
2 being circular in form and of about the diameter of three feet, of which dangerous defect in the sidewalk the defendant had full notice long prior to the said 4th day of February, 1882, on which said day, between the hours of 1 and 2 o'clock p. m., the plaintiff, while passing along said sidewalk, going east, slipped his foot upon the side of the depression aforesaid and he fell, breaking both the bones of his right ankle. A heavy snow had fallen that morning, and the said depression in the said sidewalk was filled with snow, so that the plaintiff could not see it, and he did not know it was there, and the plaintiff used due care.

And the plaintiff says that in consequence of said injury he was confined to his bed about ten weeks, and to the house about four months. He suffered great bodily pain and was subjected to great expense for physicians, surgeons, medicines, nurses, and other things consequent upon said injury. He has lost about $1,000 in his business as a stenographer. His power of locomotion is permanently impaired, and he is now compelled to get about the city in street-cars or hacks, being unable to walk any considerable distance. His car and hack hire is at least $200 a year more than before the said injury, and in consequence thereof his general health and capacity to earn a livelihood are also permanently impaired.

He claims $20,000 damages.

By S. S. HENKLE,
His Att'y.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

S. S. HENKLE,
Att'y for Pl'ff.

3 *Summons. Issued Sept. 30th*, 1882.

In the Supreme Court of the District of Columbia, the 30 day of September, 1882.

CLINTON H. EMERSON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 23948.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term occurring 20 days after service of this writ on you to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Ass't Clerk.

HENKLE, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

Marshal's Return.

Served copies of declaration, notice to plead, affidavit, and this summons on the defendant by service on Thos. P. Morgan, Commissioner, the 30th day of Sept., 1882.

C. E. HENRY, *Marshal.*

4 *Defendant's Plea. Filed Nov. 7*, 1882.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23948.

The defendant for plea says that it is not guilty as the said plaintiff in his declaration hath alleged.

A. G. RIDDLE,
Att'y for Def't.

Joinder of Issue. Filed Nov. 7, 1882.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DIST. OF COLUMBIA. } Law. No. 23948.

The plaintiff joins issue upon the defendant's plea.

S. S. HENKLE,
Att'y for Pl'ff.

5 *Note of Issue. Filed Nov. 7, 1882.*

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DIST. OF COLUMBIA. } Law. No. 23948.

S. S. Henkle, att'y for pl'ff; A. G. Riddle, att'y for def't. Last pleading filed Nov. 7, 1882.

S. S. HENKLE,
Att'y for Pl'ff.

To clerk of court.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing this third Monday, it being the 20th day, of October, A. D. 1884.

MONDAY, *October 20th, A. D.* 1884.

By order of Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened, by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

TUESDAY, *January 6th, A. D.* 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

6 CLINTON H. EMERSON, Pl't'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 23948. Cal. 113.

Now come here as well the plaintiff, by his attorney, Mr. Henkle, as the defendant, by its attorney, Mr. Riddle, and a jury of good and lawful men of the District, to wit, James A. Clark, George Turner, Charles A. Payne, Robert J. Johnson, Basel M. Chase, Thomas J. Lutrell, Samuel Queen, Eberhard Koltman, Edward J. O'Hare, Charles H. Joy, James F. Webster, and Edward V. Rice, who, being

duly sworn to try the issue above joined, after hearing a part of the evidence, are respited until the meeting of the court to-morrow morning.

Adjourned till ten o'clock to-morrow morning.

WEDNESDAY, *January 7th, A. D.* 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

CLINTON H. EMERSON, Pl't'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 23948. Cal. 113.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the further hearing of the case, are again respited until the meeting of the court to-morrow morning.

* * * * * * *

7 THURSDAY, *January 8th, A. D.* 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

CLINTON H. EMERSON, Pl't'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 23948. Cal. 113.

Now come again the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case was given them, on their oath say that they find said issue in favor of the plaintiff and assess his damages by reason of the premises at the sum of five thousand dollars, besides costs. Therefore it is considered that the plaintiff recover against said defendant five thousand dollars for his damages, in manner and form as aforesaid assessed, and $— for his costs of suit, and have execution thereof.

Motion for New Trial. Filed Jan. 10, 1885.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23948.

And now comes the defendant, The District of Columbia, by its attorney, and moves the court to set aside the verdict
8 rendered herein and grant the defendant a new trial, and for cause assigns the following reasons:

1. Because the verdict is contrary to the evidence.
2. Because the evidence is insufficient to support the verdict.

3. Because the damages assessed by the jury are excessive.

A. G. RIDDLE,
Attorney for Defendant.

Motion for New Trial on Exceptions. Filed Jan. 10, 1885.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } No. 23948.

And now comes the defendant, The District of Columbia, and files this its motion for a new trial on bills of exceptions duly taken at the trial hereof:

1. For errors of law committed by the justice presiding in the admission and exclusion of evidence.

2. For errors of law committed by the justice presiding in his rulings and instructions at the trial hereof.

A. G. RIDDLE,
Attorney for Defendant.

9 *Court Proceedings.*

SATURDAY, *January* 17, 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } Law. 23948.

This cause coming on to be heard upon the motions heretofore filed herein and of record — behalf of defendant for new trial and being considered, it is ordered that said motions be, and hereby are, overruled; from which order defendant enters its appeal to the general term.

* * * * * * *

SATURDAY, *January* 24, 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

Ordered that this term of the court be, and hereby is, kept open for the purpose of completing the bills of exceptions prayed in the respective cases wherein they are being prepared.

* * * * * * *

10 Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing the fourth Monday, being the 26th day, of January, 1885.

MONDAY, *January* 26, 1885.

By order of Walter S. Cox, one of the justices of the supreme court of the District of Columbia assigned to preside at the said term, the marshal proclaims the court as opened.

* * * * * * *

TUESDAY, *April 21st, A. D.* 1885.

Session resumed pursuant to adjournment, Cox, justice, presiding.

* * * * * * *

CLINTON H. EMERSON, Pl't'ff,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23948.

Now again comes here the defendant, by its said attorney, and tenders to the court here its bill of exceptions to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record, now for then, which is done accordingly.

Bill of Exceptions. Filed Apr. 21, 1885.

In the Supreme Court of the District of Columbia.

CLINTON H. EMERSON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 23948.

11 Defendant's bill of exceptions.

Be it remembered that at the trial of this cause before Mr. Justice A. B. Hagner and a jury regarly sworn and empaneled to try the issues between the plaintiff and defendant, the plaintiff, to maintain and prove the issues upon his part joined, offered and gave testimony tending to show that he was by occupation a stenographer, and was so on the 4th day of February, 1882; that he was clerk of the House Committee on Patents and private secretary of ex-Governor Young, of Ohio, and two or three other members of Congress; that he also reported arguments before said committee, for which he received pay in addition to his salary; that on the 4th day of February, 1882, he left his house about 9 o'clock in the morning for the purpose of keeping an engagement with ex-Governor Young at his residence on G street, near the corner of Twelfth; that he staid there until about 1 o'clock, when, at the request of Governor Young, the said plaintiff started from said Young's residence to go to the Ebbitt House to mail certain matter; that on reaching F street he walked along on the north side thereof, and in front of the premises No. 1219 he fell and broke his ankle, sustaining a compound fracture of

the right leg; that at the time of said accident it was about fifteen minutes past one in the afternoon; that the ground was well covered with snow; that the cause of his breaking his ankle was that he trod into a hole which was about in the middle of the sidewalk; that his right foot slipped and he fell upon it, breaking his right leg; that he did not know that the hole was in the sidewalk;
12 that he had not passed along on the north side of F street at that point for six months prior to said date; that he could not see said hole in the sidewalk because soft snow had covered the hole, so that it was perfectly invisible; that the said plaintiff could not say whether it was snowing or not at the time of the accident; that the best way the plaintiff could describe the manner in which the accident happened was as if he was going down stairs and thought he had reached the last step, and had stepped down with that impression; that that was the way he fell into this hole; that he fell with his whole weight on his right leg and went down with crushing force; that his residence at the time was No. 2206 I street northwest; that he went home in a hack; that he was first taken into Squire Taylor's office, located on premises No. 1221 F street, when he was afterwards removed in a hack to his home; that the only treatment that he received consisted of his leg being confined in a fracture box for seven or eight weeks; that during said treatment he had to lay on his back all the time and could not turn even on his side; that for the first two or three weeks he suffered so that he could not sleep unless he was supplied with a narcotic or something to put him to sleep; that he was confined to his house by reason of said accident until June, and was on crutches until the following fall; that only the night before the trial of this case, being a damp night, he scarcely slept one hour, which is the case every time there is inclement weather; that he can now walk probably half or three-quarters of a mile without being fatigued and no further, but before the injury he could walk any distance within reason without being fatigued; that his
13 physician's bill amounted to $250; that he didn't have a nurse. There was no appearance at all of any holes being there, and there was no depression in the snow. It was a perfectly level surface; that the plaintiff was on the north side of the hole and trod on the northern extremity of it and went down into it; that there was nothing to show the plaintiff the size of the hole or its depth; that the snow was about four or five inches deep; that it was a stormy day; that it was his right leg that got broke; that the plaintiff slipped into said hole or stumbled into said hole; that said hole was eight or ten inches deep; that the plaintiff did not see any path there, but that it was just one unbroken sheet of snow.

The plaintiff further gave evidence tending to show that for two weeks prior to the accident there had been a depression in the sidewalk where the plaintiff fell, and that on Wednesday immediately preceding Satuday, the day of the accident, it had developed into quite a hole, and that some one put a barrel in the hole, which went down nearly out of sight, when somebody put a bush inside of the barrel, on the Thursday immediately preceding the accident; that

the area of the depression that had been there for some time was about as large in diameter as the bottom of an ordinary chair; that said depression was about six or eight inches deep; that said F street is a much travelled thoroughfare; that policemen frequently passed where said depression was; that McNeal, one of the policemen on the beat, was asked why he didn't report it, and he said that he had repeatedly, and didn't know why they did not repair it; that this dangerous hole in the sidewalk was the subject of much com-
14 ment in the neigborhood; that said hole had been filled the morning or the day before the accident to within about two inches of the level of the pavement; that it was filled with dirt, and had been evidently filled with the intention of paving it with brick; that it was not paved before the accident.

And on cross-examination by the defendant of A. S. Taylor, a witness on behalf of the plaintiff, he testified that he saw the plaintiff fall; that he, the said Taylor, was standing at the door of his office, which was in the next house to the house in front of which the accident happened; that the plaintiff was on the north side of the pavement, next to the steps; that the plaintiff did not tread in the hole, but stepped on the hard surface of the trodden snow on the north edge of the hole and slipped into the hole; that it commenced to snow on the morning of the accident and snowed all day; that the sidewalks were covered with snow; that a person passing along there could not see the hole; that it was snowing at the time of the accident; that there was a path there made by the people walking around both sides of where this hole was, which path was visible; that the pavement was eight feet wide from the steps that led into the premises No. 1219 F street northwest to the curb; that after the filling of said hole on Friday people walking along on F street had stepped into the place that had been filled, which caused a depression. The witness Taylor testified that as he went to supper on the evening in which it had been filled he noticed that it had been trodden down to about six inches in depth. Another of the witnesses testified that shorty after the plaintiff had
15 been carried into Taylor's office he examined the place where he fell and found the hole about 6 inches deep, and a brick on the upper side of the hole was tilted as though some one had stepped on it and his foot had slipped down into the hole; and here the plaintiff rested.

And thereupon the defendant, to maintain and prove the issues on its part joined, offered and gave testimony to the jury tending to show that on the second day of February, 1882, a policeman reported a dangerous hole on F street, between 12th and 13th N. W., the place where the accident happened, and thereupon the defendant, on the 3rd day of February, 1882, filled the hole or depression complained of and paved the same with brick, since which time no further repairs have been made at said point; and here the defendant rested.

Whereupon the defendant, by its attorney, requested the court to grant the following instructions to the jury:

1. If the jury find, from the evidence, that before the accident to

the plaintiff complained of in the declaration the defendant was notified of the dangerous condition of the sidewalk on which the said accident happened, and that consequent upon and because of said notification the defendant caused its servants and employees to put the said sidewalk in safe condition, and that such servants and employees, in fact, put the same in such safe condition before the happening of the said accident, then the jury is instructed that the defendant cannot be held liable in this action, unless the jury further find that after such repairs the said sidewalk again became dangerous and the defendant had notice thereof sufficiently long before the happening of said accident to enable the defendant, the weather permitting, again to put the same in safe condition.

16 2. The defendant is not to be held liable for any negligence that may be found to have occurred before the notice of the existence of the hole in the sidewalk, but only for any negligence that may have occurred in repairing the pavement at that point, if any such negligence occurred.

3. If the defendant, immediately on receiving notice of the existence of the defect in the sidewalk complained of, took steps to repair the same and the condition of the said repairs was interrupted by the action of the elements, to wit, snow, so that they could not be completed before the time at which the accident occurred, the plaintiff cannot recover.

4. If the jury believe, from the evidence, that the District, after notice and before accident, put in safe condition the pavement at the point where the accident happened, but that the same became out of repair by reason solely of the action of the elements, the District is entitled to a verdict.

But the court refused to grant each and every one of said instructions as asked for by the defendant. To the refusing of the court so to instruct the defendant, severally and separately, noted exception to the refusal of the justice to grant each one of said instructions, which exceptions were duly noted by the court on its minutes before the jury retired to consider of their verdict, which was for the plaintiff in the sum of five thousand dollars, and the defendant requests the court to sign, seal, enroll, and make a part of the record this its first bill of exceptions, according to the form of the statute in such case made and provided, and it is accordingly done the 8th day of January, 1885.

A. B. HAGNER, *Justice.* [SEAL.]

17 After signing, sealing, enrolling, and making a part of the record the defendant's first bill of exception, which is made a part hereof, the court granted the defendant's first instruction after modifying and adding thereto the following:

It is not essential that the defendant should have received actual or formal notice of the dangerous condition of the said walk last referred to in the foregoing prayer; but if the jury shall find that such dangerous condition was so long continued and was so apparent in its character that the employés of the defendant charged with the supervision of the pavement ought to have observed it, if they had

attended properly to their duty in this respect, then that circumstance would be the equivalent to actual or formal notice.

To the modification of its first instruction and to granting the same as thus modified the defendant, by its attorney, excepted, and the exception was duly noted by the court on its minutes before the jury retired to consider of their verdict, and the defendant requests the court to sign, seal, and enroll and make a part of the record this *their* second bill of exception, according to the form of the statute in such case made and provided, and it is accordingly done this the — day of February, 1885.

A. B. HAGNER, *Justice.* [SEAL.]

After the signing, sealing, enrolling, and making a part of the record the defendant's second bill of exception, which is made a part hereof, the court, of its own motion, charged the jury as follows:

18 1. The defendant was bound to keep and maintain its sidewalks in good condition for foot travellers and reasonably safe for all persons passing along and over the same; and if the jury shall find from the evidence that the defendant failed to keep the sidewalk where the accident happened in such safe condition, by reason of which the plaintiff fell and sustained the injury complained of while using reasonable care and without negligence upon his part, and shall further find that the defendant had previous notice of the defect which caused the injury, or that the said defect was of such a character and was so long continued that the employés of the defendant charged with supervision of the pavements ought to have observed the same, if they had properly attended to their duty in this particular, then the plaintiff is entitled to recover in this action.

2. The jury in assessing damages in this case (if they should find for the plaintiff) are authorized to return a verdict for such sum as they shall believe from the evidence will fairly compensate him for the physical injury sustained by him from the fall, including his physical and mental sufferings; also the amount of his indebtedness incurred for medical services; also for whatever amount the jury shall find he lost in his business as stenographer during his confinement, if the jury shall believe he had at the time an established business as stenographer which was empaired or destroyed by the confinement consequent upon the injury, and for any permanent injury to his health and to his capacity to earn a livelihood they may find established by the evidence to have been caused by the accident.

19 3. Reasonable care mentioned in the foregoing prayer means that degree of care which may reasonably be expected from a person placed in the plaintiff's situation at the time of the alleged injury.

To the granting of each said instructions the defendant, severally and separately, noted exception, which exceptions were duly noted by the court on its minutes before the jury retired to consider of their verdict, and the defendant requests the court to sign, seal, enroll, and make a part of the record this its third bill of exception,

according to the form of the statute in such case made and provided, and it is accordingly done the 8th day of January, 1885.

A. B. HAGNER, *Justice.* [SEAL.]

After the signing, sealing, enrolling, and making a part of the record the defendant's third bill of exception, which is made a part hereof, the defendant further requested the court to grant the following instructions:

If the care of the streets of the city of Washington, as a public duty, is imposed by the statute upon the District of Columbia, the performance of which is for the general benefit and the District derives no profit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such public duty.

The District of Columbia, under the form of government existing at the time of the accident which is the subject-matter of this suit, is not liable for damages resulting from said accident.

20 The present government of the District of Columbia having been imposed upon the people of the District without any power or opportunity on the part of said people to accept or reject the same, the District cannot be held responsible for the negligence of said government.

The present form of government of the District of Columbia, consisting, as it does, of officers who are all appointed and paid by the United States, without any power to levy taxes or to spend money except as directed by Congress, is not of such character as to make the District responsible in damages for any negligence of those officers.

But the court refused to grant each and every one of said instructions. To the refusal of the court to grant each one of said instructions the defendant, severally and separately, noted exception, which exceptions were duly noted by the court on its minutes before the jury retired to consider of their verdict, and the defendant requests the court to sign, seal, enroll, and make a part of the record this the defendant's fourth bill of exception, according to the form of the statute in such case made and provided, and it is accordingly done this 8th day of January, 1885.

A. B. HAGNER, *Justice.* [SEAL.]

After the signing, sealing, enrolling, and making a part of the record of the defendant's fourth bill of exception, which is made a part thereof, the court, of its own motion, further instructed the jury as follows:

21 GENTLEMEN OF THE JURY: The first instruction which the court gives you is in these words:

(Here follows instruction numbered 1, on page 7.)

The third prayer of the plaintiff refers to the question of reasonable care, and on this subject I have said:

"Reasonable care, mentioned in the foregoing prayer, means that degree of care which may reasonably be expected from a person placed in the plaintiff's situation at the time of the alleged injury."

The first point to be considered by you is whether the plaintiff was at the time of the accident using reasonable care and whether this accident occurred without negligence on his part. You have had his own statement that such was the case. As nobody saw the accident except those standing in Mr. Taylor's office and Mr. Lawrence, who was on the outside, and they say nothing contrary to the statement of the plaintiff that he was walking with due care, but all apparently confirm his testimony in this particular, although there is no evidence directly upon this point, except that of the plaintiff himself, you are to judge of the matter from the testimony and say whether he was using reasonable care. It is only necessary for me to say, with respect to one of the arguments — the defendant's counsel, that this was so wide a pavement that he might have passed in safety on the south side of the hole, that I think this consideration is not sufficient in itself (if you believe that he could have done so) to impute to him want of reasonable care in walking, as he did, along the north side of the pavement. All persons are au-
22 thorized to assume that the whole pavement is in proper condition for them to walk on, and the plaintiff was not obliged — confine his walk to one particular place if he knew nothing of this hole and had no warning before him to indicate that it was a dangerous place, and the fact that he was not walking in a path either on the north or south of the place where the hole existed is not to be taken as evidence of want of reasonable care.

Passing from the question of his negligence, we come to the next point. Was this pavement out of condition through the fault of the defendant, The District of Columbia? The defendant was bound to keep its sidewalks in proper condition, and the evidence is that there was this hole there and that this man fell into it. The District of Columbia cannot be held answerable unless you believe, in addition to the fact that this dangerous hole was there, that the District had actual knowledge, through its officers, of the dangerous condition of the pavement anterior to the accident or that the circumstances surrounding the matter were such that notice should be imputed to it. This point has been considered by counsel on the two sides under two aspects.

The position of the plaintiff is that the opening had been existing there for two weeks or more, and had developed to the extent spoken of by Mr. Taylor on the Wednesday preceding the accident, and that it never was properly repaired, inasmuch as the extent of the repair which was done on the 3rd of February was to put earth in there and leave the place unpaved, the bricks being piled up in one place or another on the pavement, so that there then existed a depression when the workmen went away from there. You are to determine from the evidence (supposing you find that was the condition of the pavement when left by the workmen) whether that con-
23 dition was actually known to the District of Columbia authorities or was of such publicity or notoriety in appearance and continuance that knowledge of it is to be imputed to the District. Now, if it be true that the persons who came to repair it on the 3rd of February did not pave it, but left a hole a brick deep in the cen-

ter of the hole, of course they, as agents of the defendant, knew that they had left it so, and the District, through them, had actual notice that it was then left unpaved. I say, therefore, if you should find that the condition of the pavement, because the workmen left this place unpaved, was dangerous, then that was in effect a continuation of the dangerous condition of the two weeks previous, but in a modified, though possibly less hurtful, extent.

Now, what was the extent of the actual or imputed knowledge of the District, as to this state of things, for the previous two weeks? First, as to actual knowledge:

Lawrence, who was employed in Mr. Taylor's, says this had existed for ten days or two weeks prior; that the hole was there during that time and kept sinking; that he called a policeman's attention to it, who said that he was tired of reporting it. Another witness, Chew, says that he thinks it was officer McNeal whose attention he called to it; that customers were coming into his barber shop and complaining of the hole in boisterous talk; that he reported it to McNeal, the policeman, who told him before the accident that he had reported it frequently to the authorities; that he had reported it several times, and he didn't see why the board did not attend to it. These witnesses speak as to direct notifica-
24 tion. They were adduced by the plaintiff. On behalf of the defendant McNeal said that he did not remember anything of the matters stated by Chew; that he did not recollect the alleged conversation, nor did he recollect having made a report, though he had an impression on the subject. It is admitted, however, by the defendant that on the second day of February the condition of that hole was reported to the authorities, so that the condition of the hole as it existed at the time when workmen were sent there is admitted to have been such as described by the witnesses.

But if you do not find that the authorities knew by actual notification of the condition of the hole before the men went there to fill it, you are justified in taking into consideration all the circumstances and consider whether they may not impute notice. Policemen and other officers walking along the street are charged with the duty of noticing the necessity of repairs of the pavement, and you may consider whether if they were attending to their duty they ought to have known of the condition of the pavement if they were diligent. The witnesses say that the clerks who were accustomed to pass there knew of this hole and had gone around on the two sides of it. Somebody, who was not in the employ of the District, brought out a keg and set it in the hole on Wednesday. The neighbors saw that the keg was sinking down in the hole, and on Thursday, as a further warning, there was a bush placed in the keg. Persons who stepped in the barber shop spoke of the condition of this place, and from this evidence you may conclude whether its existence was a matter of such notoriety as to have apprised officers in the employment of the government of the District and who wanted
25 to discharge their duty that there was a defect in the pavement which should have been remedied.

Now, take the defendant's view of it. The defendant's witnesses

testify to the effect that by midday on Friday, the day before the accident, the brick had been relaid there and the pavement was left apparently in a safe condition; that the workmen put proper filling in the cavity and rammed it down as hard as they could, and they laid the bricks, and when they left there the pavement was in good condition. Thus between the parties there is raised a direct issue of fact, and I will read from my notes of the evidence on the point.

For the plaintiff: Taylor says that on Wednesday the pavement had sunk, and that the hole was so large that some one put a barrel in it, which went down, and on Thursday a bush was put in the barrel; that the accident occurred on Saturday; that the hole was caused by the caving in of the sewer; that the barrel was standing on end or slanting; at first the depression was as large as the bottom of a chair; that it then grew larger, and remained so two or three weeks, and before it broke away the depression was five or six inches in depth; that F street was a much travelled thoroughfare, and that there was always one or two policemen passing along there every day. The hole had been filled the day before the accident—that is, on Friday; that the men quit work at ten or eleven o'clock; that they piled the bricks against the iron fence next to Taylor's office; he afterwards said that they might have been piled inside the fence or they might have been piled on the curb; that the workmen filled within two inches of the level of the pavement with dirt, and that the snow commenced to fall Saturday morning;
26 that on Friday afternoon he was passing that way after it had been filled up, and that people had trod on it and deepened it somewhat; that it was then about six inches deep in the center, which would seem to show or go to establish the plaintiff's theory that there were no bricks there, nothing but the filling; that a path had been made on each side of the place where this depression was, and that he left the office about five o'clock on Friday.

Lawrence, also a witness for the plaintiff, states that it was twelve or fifteen inches deep near the middle, and that it got to going down and became so bad that, to give notice of it, they put a tree in it; that he saw a cart back up on Friday before the accident, and dirt was put into the place, and it was left about a depth of a brick below the level of the pavement; that at the time of the accident the bottom of the hole was five or six inches below the level of the pavement, and that the snow in the hole was on a level with the pavement on each side. Chew says they filled the hole up to within about the depth of a brick of the level of the pavement, and also says that a bush was put in the hole. Carter says that he examined the place after the plaintiff was brought into the office, where he slipped and fell, as he supposed, and found a depression in the pavement as if the bricks had been taken out; that it seemed as if bricks had not been put back in the hole, and the bricks on the edge looked as if somebody had slipped on them. The hole was not over six inches deep. On the contrary, Cooksey, the defendant's witness, says that he sent Mahorney and Johnson for gravel, and he thinks
27 it was paved the same day, between dinner time and one o'clock. He says, "I didn't see the hole until after it was

filled up. I was there afterwards, on the afternoon of the 3rd, and he was paving it. If the others say it was not paved I will not insist, but that is my impression." He says again, "I have no recollection of having been called there since. I do not recollect positively of the paving of the hole. If it was paved when it was repaired it ought to have been in the report; it would look better. I would replace the pavement at the time of filling; if not at that time, then the next time we repaved the street."

Mahorney, who was the laborer, says that in February, 1882, the time that Cooksey gave the order for filling the hole and paving it, he went with Johnson, and he testifies positively that at the time these holes were filled they were paved. He remembered that it was on the third day of the month. He thinks it was Friday or Saturday.

Johnson does not identify the day particularly, but he also testifies that at the time the holes were filled the paving was done. "I cannot tell the very days that I was employed; I do not know what day this was."

Welch, who was the paver, says that at a certain time he was sent for and told by Cooksey to go there. He was told to go there about 12 o'clock, by which time the hole would be filled, and that he was afterwards to pave it; that he got there at 12½ o'clock and paved it. He doesn't remember the date, but it was in February. That is the evidence bearing upon that subject.

28 I do not pretend to quote literally the testimony, but simply to call your attention to the direction of the evidence, not meaning to vouch for the accuracy of my statement of it; but it is from all the evidence that you are to decide the question whether that place was paved by the government workmen before they left it the day before the accident, and whether they left the pavement in a fair and good condition. If you take that view of it, that it had left it in a fair and good condition, then what I have said at the request of the defendant in this first instruction applies.

(Here follows the first instruction asked for by the defendant as modified by the court.)

The modification of the prayer as it was asked by the defendant consists of an explanation of the meaning of the expression "notice." Now, you understand that this is predicated of the idea that on the third day of February the government put that place in a fairly good condition—as they had reason to believe, in a safe condition—and that after that it sunk. Now, if this man was injured in consequence of that sinking, after it was put in a fair and good condition, the District is not to be held responsible, unless you believe that after the sinking they had actual notice that it had sunk again, or that the depression was so apparent that persons charged with the inspection of streets, if they had done their duty, might have seen it. It was about one o'clock on Friday when it was paved, as the District insists. If that statement is correct, then you have only until probably about dark of that day when persons passing along here would have observed it. If Mr. Taylor is correct, then at five o'clock on that evening it had sunk five or

six inches. He said there was no bricks there; at any rate, he said that there was a hole there five or six inches in depth. Whether this was the case is for you to determine. [Admitting that the District had no notice of that particular sinking, and conceding it had paved here, and that they didn't have distinct notice of the new depression, yet, if its condition was of such public notoriety, the police patrolling there ought to have seen it, and if you find it was in the condition spoken of, then the plaintiff would be entitled to recover.]

There is one other matter, and that is the question of damages. (Here follows the court's instruction, which was granted, on that subject.)

Mr. MILLER: I desire to suggest to your honor that you have charged the jury on the theory that this accident was entirely and necessarily the result of this depression in the sidewalk. If your honor has given any other theory of this accident independent of that I have seen nothing in the charge of your honor that would release us from responsibility.

The COURT: I was not asked to say anything upon that subject.

Mr. MILLER: In regard to this matter your honor ignored entirely the hypothesis upon which we have conducted our defense, that the accident was not the result of this hole at all.

The COURT: I commenced by saying he could not recover if the jury found that it was the plaintiff's own fault, his own negligence, and I added that the only remark that I should make in reference to that was to notice one of the arguments used by the defendant here, that this was a wide pavement, and that the plaintiff might have walked elsewhere with security.

Mr. MILLER: I am content to reserve my exception.

The COURT: If you will allow me, what I observed was that that argument was not entitled to the weight which the defendant's counsel, Mr. Miller, thought, I understood, attached to it. You spoke of the width of the pavement; his walking around that. I say again that a man is entitled to suppose that a pavement, one part as well as another, is in safe condition if there is nothing in the appearance of the pavement to indicate its condition. He is not obliged to skim along one side or the other. He can go as his convenience suggests to him, and when he falls in a hole there, which is there through the negligence of the District, of which he is not aware, then I say that the fact that he accidentally walked into the hole instead of walking elsewhere, where it was safe, does not impute negligence to him.

Mr. MILLER: I simply desire to reserve an exception on the ground that I have indicated.

Mr. DAVIS: There is another portion to which we desire to repeat our exceptions. You honor told the jury that if they should find that this place had been repaired and paved, and that after they thus found it had been repaired and paved it became out of condition during that afternoon, so that persons might see it, the District might be held liable. That was substantially as I understood your honor's charge—that portion of the charge of having notice after the repair.

The COURT: I do not know that you quote me correctly, but you can take your exception.

To so much of said charge of the court as is included in the
31 brackets, and to the omission of the court to charge the jury as suggested by Mr. Miller, of counsel for the defendant, the defendant then and there severally and separately excepted, and the exceptions were noted severally and separately on the minutes of the court before the jury retired to consider of their verdict, and the defendant, by its counsel, requests the court to sign, seal, and enroll and make a part of the record this the defendant's fifth bill of exceptions, which is accordingly done this 8th day of January, 1885.

A. B. HAGNER, *Justice.* [SEAL.]

Proceedings in General Term.

MONDAY, *April 27th*, 1885.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the fourth Monday, 27th day, of April, 1885.

Present: Chief Justice Cartter, Justices Wylie and James.

* * * * * * *

MONDAY, *June 8th*, 1885.

Session resumed pursuant to adjournment.

Present: Justices Cox, James, and Merrick.

* * * * * * *

CLINTON H. EMERSON, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 23948.

This cause having been argued by counsel on both sides and submitted to the court, it is thereupon, after mature deliberation, considered by the court that there is no error in the judgment of the special term, and that said judgment be, and it is hereby, affirmed, with costs, to be taxed by the clerk, and that the plaintiff have execution thereof.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Clinton H. Emerson and the District of Columbia, being No. 23948, at law, a manifest error hath happened, to the great damage of the said District of Columbia, as by its complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the

record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 5th day of October, in the year of our Lord 1885, and of the Independence of the United States the one hundred and tenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Clinton H. Emerson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein the District of Columbia is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chief Justice.

Service acknowledged October 17, 1885.

S. S. HENKLE,
Att'y for Pl'ff.

33 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 17th day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of said court, to be in due form.

Witness my hand and seal this 17 day of October, 1885.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 17 day of October, 1885.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 183. The District of Columbia, plaintiff in error, *vs.* Clinton H. Emerson. Filed October 26, 1885.

Office Supreme Court U. S.
FILED,
JAN 23 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 183.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CLINTON H. EMMERSON.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE PLAINTIFF.

A. G. RIDDLE, *Attorney D. C.*

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 183.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CLINTON H. EMMERSON.

In Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE PLAINTIFF.

A. G. RIDDLE, *Attorney D. C.*

THE CASE.

Suit for personal injury caused by falling into a depression in the sidewalk February 4, 1882, at 1 p. m., whereby a limb was fractured, &c.

Verdict and judgment for plaintiff for $5,000 (p. 4); affirmed in the general term (p. 6–16).

ASSIGNMENT OF ERRORS.

The court erred in overruling the District's first prayer (p. 8).

In sustaining the charge of the court matter in brackets, p. 16; exception, p. 17.

In rejecting the prayers of the District set forth in its fourth bill of exceptions (p. 11).

POINTS MADE.

First. It appears by the bill of exceptions (p. 8) that the District had notice of a depression—the *locus*, on the 2d of February. That it caused the opening to be filled and paved on the 3d. It is to be remembered this was in the winter season and the weather stormy and freezing, by reason of which it would seem that the repairs yielded under use, to the original infirmity of the earth below, at that point.

The accident occurred about 1 of the next day. Clearly this prayer correctly sets forth the law of the case and should have been allowed.

The modification of the rule thus laid down, attempted by the court, in its charge in brackets, p. 16, not only repeats the error, but supplements it by another.

There was no showing that the repairs of the 3d were not as well done as the season and conditions admitted. But the court treats the case in effect as if no repair had been made. For to say that if the new sink might have been seen by the police, before the accident, that the plaintiff could recover, is preposterous.

It is not the duty of a policeman to repair a damage in a sidewalk. He should report a dangerous defect as soon as practicable, and the repair should be made within a short practicable time. Time sufficient for discovery, prompt report, and prompt action are necessary. Whereas there is no proof or legal presumption that a police officer was on the street on the evening of the 3d or during any part of the 4th.

If the court was right a sight of this depression of the sidewalk by a policeman two minutes before the accident, would render the District liable. No defence dependent on notice is possible under this rule.

Second. THE LIABILITY OF THE DISTRICT FOR THE DEFAULT OF THE GOVERNMENT.

It will be conceded that no act of Congress makes the District liable to suit for personal injury, as in the case under consideration.

Nor will it be contended that the streets and avenues of the city are a source of revenue to the District, within the meaning of the cases bearing upon this point.

The liability, if it exists, must be referable to a rule obviously arising from the status of the District, its people and their property, in relation to the cause of action.

The case of *Wightman* vs. *Washington City* (1 Black, 39) deals with the question of municipal liability in an elementary way, and, so far as I know, has been followed in the Supreme Court, and on the ground there laid down, in the cases in that Court since. The conclusion there reached and the reason for it have never been shaken.

That was a suit to recover for a personal injury caused by the falling of a bridge over Rock creek. The duty to keep this in repair was specifically imposed on the corporation, by its charter—an act of Congress.

The question of ultimate legal liability was considered with care. Upon this point the court said:

> "Whether the action in this case is maintainable against the defendant or not depends upon the terms and conditions of the charter, as is obvious from views already advanced." Which were: 'When it appears from the several provisions of the charter that the burden was imposed *in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control,* they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.'"

The court speaking of the defendant corporation really speaks of the corporators as "they" and "them," for they use their powers and exercise their franchises.

It goes on:

> "In view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants *in consideration of the privileges and immunities conferred by the charter*. Most ample means, also, are placed at the disposal of the defendants or within their control to enable them to perform the duty enjoined.
>
> "On this one point it would seem there can be none (no doubt), as the defendants have very large powers to levy and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they derive means for granting licenses," &c.

Thus, then, the duty to the corporation flows from the available use of powers and franchises, enabling it to perform its duties and command means to respond in damages.

This remains the judicial rule of the District—the law of this case. It derives the liability to suit directly and wholly from privileges and powers conferred upon the corporation. Necessarily when these franchises and powers cease liability departs with them.

It is known to the court that after the civil organizations of the District, and till the act of February 21, 1871 (16 Stats., 419, and Rev. Stats. D. C., p. 2), took effect, there were three municipalities within the territory on the northerly side of the Potomac; that these were merged in the District as a municipal government by the above statute. It may be borne in mind that these municipalities are unlike any known municipalities, in this, the inhabitants of the District can exercise no franchise of American citizenship, except as members of a municipal corporation. The municipality created by the act of February 21, 1871, was in effect abolished by the act of June 20, 1874 (18 Stats., 116), which created a commissional government. Congress was so well pleased with this its temporary expedient that by

act of June 11, 1878, it made that government permanent. (Supplement to Rev. Stats., 339.)

This but makes permanent the abolition of the real municipality. Whoever examines the act will see that the new government is a device whereby the United States, exercising its own immediate authority, governs the people of the District in its own interest without any right of interference on the part of the people whatever. Congress can alone legislate for the District. The President appoints its executive, and this or these appoint all the subordinates. Congress levies all taxes upon the property. When collected they are paid into its treasury, paid out by its appropriation, and all District disbursements are accounted for to its controller. The District is as much a subdepartment of the United States Government as any agency in its civil service, and in all its suits the United States is the real party in interest.

It is true that the statute perpetuating this state of things ironically declares: "The District of Columbia shall *remain* and *continue* a municipal corporation, as provided in section 2 of the Revised Statutes relating to said District." When it is remembered that there are no corporators, no council, no corporate officers, franchises, nothing but unrequited burdens, it is realized that this is the purest legal fiction ever perpetrated by an inventive legislative body.

What can be said of this liability on the part of a people who have no rights, powers, or franchises as a consideration? Had this people surrendered their corporate powers and franchises and elected to take the present government some show might be made possibly that the contributions of Congress, its government and legislation, took the place of their own thus given up, and so this old liability continues. There is no foundation for this, nor is there any foundation for holding the commissional government responsible for this class of cases. They exercise a share of constituted power, for public purposes, in the same way as

do the commissioners and supervisors of counties, the trustees of townships, out of which no causes of action can arise.

In the case of *Clark* vs. *The District* (3d MacArthur, 79) the supreme court of the District passed adversely upon this proposition, regarding it as within the *Barnes case* (91 U. S., 540), not distinguishing between the changed conditions of the District when the cases arose.

A change in the law of the jurisdiction of this Court prevented a review of the Clark case, nor has the court below since permitted a reargument of this question, steadily adhering to the Clark case.

When the Barnes case arose the District was in full possession of the large municipal powers conferred by the act of February 21, 1871, cited above, and hence was within the broad reach of the Wightman case, before quoted.

The main proposition of the Barnes case was that the District was not responsible for the acts of the Board of Public Works, created by the 37th section of the act of February, 1871, on the ground that that body was an independent power, not a District agency. Indeed, the general question of liability of a municipal corporation for its own acts was hardly before the court in the case. It certainly does not nor does any case impair or add to the Wightman case.

To regather and attempt a review of the wide field of the American and English cases bearing upon this question would be a useless labor.

The case of *Hill* vs. *The City of Boston* (122 Mass., 344) has done this, down to 1877, in a manner to render all inferior work gratuitous. The immediate occasion was the difference between the rulings upon the question of municipal liability to suit for damages, as in this case, between the Supreme Court of the United States and of Massachusetts, a decision which lays all examiners of the question in its many aspects under the deepest obligation to that court. It is a repository of the cases admirably stated and arranged, and its conclusions satisfactory to those at liberty to accept them.

Differing as do the cases of Wightman and Hill, they concur in exonerating the District from liability in this case, as I submit.

Third. ANOTHER VIEW IS SUGGESTED.

The agency employed by Congress for the government of the District, though called a municipal corporation, under the case of Barnes above, as under the two leading cases just referred to, as well as a multitude of other authorities, may be said to be of the nature of counties and townships of the various States, and can no more incur liability for the cause of action under consideration, than can those *quasi* corporations.

Respectfully submitted,

A. G. RIDDLE.

Supreme Court of the United States.

OCTOBER TERM, 1888.

DISTRICT OF COLUMBIA
vs.
CLINTON EMERSON. } No. 183.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF S. S. HENKLE, COUNSEL FOR DEFENDANT IN ERROR.

MILANS, LAW PRINTER, 519 7TH STREET, N. W.

Supreme Court of the United States.

OCTOBER TERM, 1888.

DISTRICT OF COLUMBIA
vs.
CLINTON H. EMERSON. } No. 183.

Error to the Supreme Court of the District of Columbia.
Brief of Counsel for Defendant in Error.

STATEMENT OF THE CASE.

This is an action brought by defendant in error against the District of Columbia to recover damages for an injury received by him on the 4th of February, 1882, by stepping into a hole in the sidewalk on the north side of F street between 12th and 13th streets, northwest, in the City of Washington, by which both the bones of his right ankle were broken. The accident occurred between twelve and one o'clock a. m. A heavy snow had fallen that morning and the hole was covered by it. He did not know that there was any defect in the sidewalk. The plea was "not guilty." The case was tried and the jury rendered a verdict for $5,000 damages, and judgment was entered for that amount and costs, (Rec. 4).

The defendant below filed a motion for a new trial upon the following grounds:

1st. Because the verdict is contrary to the evidence.

2d. Because the evidence is insufficient to support the verdict.

3d. Because the damages are excessive, (Rec. 4).

It also filed a motion for new trial on bills of exceptions.

1st. For errors of law committed by the justice presiding in the admission and exclusion of evidence.

2d. For errors of law committed by the justice presiding in his rulings and instructions at the trial, (Rec. 5).

Which motions were heard and overruled by the trial justice and an appeal taken to the general term, (Rec. 5).

The case was argued in the general term on the 8th of June, 1885, and the judgment of the special term was affirmed, (Rec. 17).

And thereupon the defendant below sued out a writ of error to this court.

The judgment of the general term being final upon the first motion, the case can only be heard in this court on the bills of exceptions.

Argument on Exceptions.

There are no exceptions in the record for errors in receiving or rejecting evidence.

The first exception is on pp. 8 and 9, Record.

Four prayers are grouped together, and the exception is because they were each and every one of them rejected by the court.

We will consider them *seriatim*.

1. Prayer is to the effect that if before the accident the defendant had notice of the dangerous condition of the sidewalk on which the accident happened and caused it to be put in safe condition before the hap-

pening of the accident, the plaintiff cannot recover, unless they further find that after such repair the sidewalk again became dangerous, and the defendant had notice sufficiently long before the happening of the accident to enable the defendant, the weather permitting, to again put it in safe condition.

It is alleged that this prayer was refused, which is not true. It is true that it was refused as offered, but was given with the explanation by the court as to what was notice. (See foot of p. 9, Rec).

"It is not essential that the defendant should have received actual or formal notice of the dangerous condition of the said sidewalk last referred to in the foregoing prayer; but if the jury shall find that such dangerous condition was so long continued, and was so apparent in its character that the employés of the defendant charged with the supervision of the pavement ought to have observed it, if they had attended properly to their duty in this respect, then that circumstance would be the equivalent of actual or formal notice."

Not a word of the prayer was altered but simply the explanatory remarks of the court were added, which if not absolutely necessary, were at least proper, and it was certainly ~~but~~ not error to attach them.

There can be no doubt but that this law as to notice was correctly given by the court.

The second prayer in the omnibus first exception, p. 9, is:

"The defendant is not to be held liable for any negligence that may be found to have occurred before the notice of the existence of the hole in the sidewalk, but only for any negligence that may have occurred in repairing the pavement at that point, if any such negligence occurred."

This prayer in the form in which it was presented, was properly rejected for several reasons. It does not present any tangible idea that the jury could have understood, but assumes that the defendant is not liable for negligence which occurred before it had notice of the dangerous condition of the sidewalk. If the actual notice which was in evidence was intended, which is probable, the court could not properly have so instructed, without instructing the jury that the defendant would be liable when there was constructive notice from notoriety of the defect in the sidewalk, the testimony showing that it had been there for several days, if not weeks, before the report of it by the policeman. The evidence showed that the people doing business on the street in the neighborhood of the hole, and persons coming into their shops and offices had been talking of this dangerous defect in the sidewalk, and animadverting upon the District authorities for not repairing it, for days, if not weeks before the report of the policemen on the 2d of February, put in evidence by the defendant, as fixing the date of its notice. That this same policeman was asked by one of the witnesses why he didn't report it, and he said that he had reported it repeatedly, and he didn't know why they didn't repair it. (Rec. 8.)

The latter part of the prayer, viz., that the defendant wonld only be liable "for any negligence that may have occurred in repairing the *pavement* at that point, if any such negligence occurred," might have meant either of two or three things. It might have been construed to mean that the District would only be liable for the delay in repairing; or it might have meant that it would only be liable for the negligent manner in which the work was done, but nobody could tell which.

Again it refers to the repairing of the "*pavement.*" Is pavement used for sidewalk, or is it used to denote

the surface of bricks upon the sidewalk? The evidence of the plaintiff below was that workmen in repairing had partly filled up the hole, but had left it *unpaved*, and that bricks were piled up on the sidewalk. If the latter was intended, as would seem most probable, it would have been of no use to lay the bricks unless they had first properly and securely filled the hole.

The jury might have been able to understand this prayer, but I confess I am not.

Whatever may have been intended was all properly covered by the charge of the court on pages 12 and 13, Rec.

The third prayer in the group covered by the first exception is:

"If the defendant immediately on receiving notice of the existence of the defect in the sidewalk complained of took steps to repair the same, and the condition of repairs was interrupted by the action of the the elements, to wit, snow, so that they could not be completed before the time at which the accident occurred, the plaintiff cannot recover."

This prayer could not properly have been given without the explanation or modification by the court as to the notice. The notice intended was doubtless the actual notice of the 2d of February by the policeman, but the District had notice by public notoriety, if not actual notice probably weeks before, and had all that time neglected to repair. This prayer was to the effect that if the repairs were begun after the actual notice of February 2, and were interrupted by snow, so that they could not be completed before the accident, the District would not be liable. The testimony showed that the repairs should have been made long before they were begun, and when there was nothing to interrupt them, and that it was guilty of

gross negligence in deferring the repairs so long; so that this prayer could not have been properly given if the facts would otherwise have justified it, but the testimony showed that what repairs it did make were completed by one o'clock p. m. of Friday, the 3d of February, and the snow didn't fall until Saturday morning, the 4th of February, the day the accident occurred. There was no testimony which would have justified the jury in finding that the repairs were interrupted by the snow.

The District claimed that they had repaired the defect and left it in a safe condition on Friday. The prayer was contrary to its own testimony and theory of defense.

There was no testimony from which such a finding could be had, and it would have been error to give it.

Tucker *vs.* Moreland, 10 Pet., at 78;
Michigan Bank *vs.* Eldred, 9 Wall., at 553;
U. S. *vs.* Breitting, 20 How., at 355;
Roach *vs.* Huling, 16 Pet., at 326;
McNiel *vs.* Holbrook, 12 Pet., at 88;
Rhett *vs.* Poe, 2 How., at 483.

Fourth prayer of the group is:

"If the jury believe from the evidence that the District, after notice and before the accident, put in safe condition the pavement at the point where the accident happened, but the same become out of repair by reason solely of the action of the elements, the District is entitled to a verdict."

The evidence as summed up by the presiding justice in his charge to the jury, (Rec. 14,) shows that the defect in the sidewalk was a very dangerous one, and was on one of the most used streets in the city, and that policemen were passing there several times a day. Supposing the District had repaired the sidewalk so as to

make it safe, and it afterwards got out of repair by the action of the elements, it would have been its duty to have immediately repaired it again or have protected the unwary pedestrian against falling into it by surrounding it by a barricade or putting up a danger signal if it had notice that it was again out of repair.

It is as much the duty of the District to repair the dangerous defects in the sidewalks occasioned by the action of the elements as those arising from other causes.

The prayer was bad because it sought to instruct the jury that if after the first repairs the sidewalk was again rendered unsafe by the action of the elements, there was an immunity from liability without any qualification as to notice.

The same instruction with the qualification as to notice was asked by defendant below in the first of its prayers, and it was given as asked, with the explanation as to what was notice. (See foot p. 9, Rec). The part of the prayer alluded to is as follows:

"Then the jury is instructed that the defendant cannot be held liable in this action, unless the jury further find that after such repairs the sidewalk again became dangerous and the defendant had notice thereof sufficiently long before the happening of said accident to enable the defendant, the weather permitting, again to put the same in safe condition."

And again in his general charge to the jury at the foot of page 15, Record, the court said:

"Now, if this man was injured in consequence of that sinking after it was put in a fair and good condition, the District is not to be held responsible, unless you believe that after the sinking they had actual notice that it had sunk again, or that the depression was so apparent that persons charged with the inspection of the streets, if they had done their duty, might have seen it."

As the fifth and last exception on page 15, Record, relates to the same point, I will skip for the present the third and fourth exceptions and dispose of the fifth.

The part of the charge on page 16, Record, within the brackets was excepted to. It is as follows:

"Admitting that the District had no notice of that particular sinking, and conceding it had paved here, and that they didn't have distinct notice of the new depression, yet if its condition was of such public notoriety, the police patrolling there ought to have seen it, and if you find it was in the condition spoken of, then the plaintiff would be entitled to recover."

The court will see it is but a reassertion in different phraseology of the preceding instructions, and was given with direct reference to the testimony of Esq. Taylor, a witness for the plaintiff, (Rec. 8). Taylor had testified that at about five o'clock on Friday evening, after the agents of the District had done their work on the sidewalk, in passing to go to his supper he noticed that the hole had sunken or been trodden to the depth of about five or six inches, and that there were no bricks over the hole.

The court alludes to this testimony of Taylor, and says "whether this was the case is for you to determine."

The justice then proceeds to say that if the defendant did not have notice of this new depression—

"Yet if its condition was of such public notoriety that police patrolling there ought to have seen it, (and if you find it was as spoken of,) then the plaintiff is entitled to recover."

That is to say, if you find that after the attempt to repair on Friday, the hole had sunken the same afternoon to the depth of five or six inches, and was again

in a dangerous condition, and you find that it was of such public notoriety that the policemen patrolling there ought to have seen it, then the plaintiff is entitled to recover.

The defendant, of course, takes notice and acts only through its agents, and the same degree of care and prudence is required of them as would be of an individual.

Among these agents are the police and they are specially charged with the duty of looking out for and reporting dangerous defects in the streets and sidewalks.

If a policeman had seen this hole on Friday afternoon or evening, or on Saturday morning, it would have been his duty to have at once reported it, and in the meantime to have covered it up, or erected some protection against it, or to have put up a danger signal, and if he had seen it and failed to do one of these things, the District would unquestionably be liable.

Now, the court says in addition to this, if it was so notorious that it was its duty to have seen it, and guarded the public against it, the defendant is liable; but the whole matter is left to the jury to determine.

It must be apparent to the court that no sufficient repair of the sidewalk was in fact ever made until after the accident to the defendant in error.

On the day before the accident. some paltry show of repairing was done about the middle of the day, but before the sun went down it was nearly as bad as before—the evidence being that at 5 o'clock in the evening the hole had sunk to five or six inches in depth.

I think the court did err, but it was in favor of the plaintiff in error in conceding that this paltry pretence of repairing might be considered as repairing at all—a repairing which left the sidewalk in as bad condition as it was before, and more dangerous because

the District workmen removed the danger signal, which if left standing would have saved the leg of the plaintiff below.

THIRD EXCEPTION.

The series of instructions found on p. 10 Rec., given by the justice on his own motion, numbered 1 to 3 inclusive, and together constituting the third exception, are each unquestionably correct.

FOURTH EXCEPTION.

(Rec. 11). This is a bunch of four general propositions which are not separately numbered. They purport to announce the law governing the liability of the District of Columbia for damages resulting from a neglect to perform its public duties generally.

The substance of the first is that if the care of the streets of the City of Washington as a public duty is imposed by statute upon the District of Columbia, the performance of which is for the general benefit, and the District derives no profit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such public duty.

The second is that the District of Columbia, under the form of government existing at the time of the accident, which is the subject-matter of this suit, is not liable for damages resulting from said accident.

The third is the present form of government of the District of Columbia having been imposed upon the people of the District without any power or opportunity on the part of said people to accept or reject the same, the District cannot be held responsible for the negligence of the said government.

And the fourth, the present form of Government of the District of Columbia consisting of officers who are

all appointed and paid by the United States, without any power to levy taxes or to spend money, except as directed by Congress, is not of such character as to make the District responsible in damages for any negligence of said officers.

They are not in the form of instructions. They give no direction to the jury. They don't say if you find this way or that from the evidence you should find for the defendant, but simply propose to tell the jury that certain things are law without in any way telling them how to apply it to the facts of the case with which they were dealing. If they had all been given just as requested, the jury would not have known without further direction from the court that their verdict should in any way be affected by them. The court is not bound to and should not give any instruction upon general and abstract propositions of law without telling the jury how to apply them to the facts which they may find.

Said this court in Rhett *vs.* Poe, 2 How., at 483:

> It is a settled rule of judicial proceedure, that the courts will never lay down as instructions to a jury general or abstract position, such as are not immediately connected with and applicable to the facts of a cause, but require that every prayer for an instruction should be preceded by and based upon a statement of facts upon which the questions of law naturally and properly arise."

The prayers are not connected with any statement of facts. The legal points raised by them are nowhere raised by the pleadings, nor do they appear in the Record at any stage of the case, until the trial is finished. The defense is conducted upon the theory that the defendant is liable if the evidence should sustain the plaintiff's claim. Just before the case is committed to the jury the defendant asks the court to give these ab-

stract propositions to the jury, without telling the jury what to do with them.

The defendant below, if it wished to avail itself of this defense by way of excepting to the refusal of the court to give instructions, should have asked the court to charge the jury that the law was as it claimed, and that therefore no action could be maintained against the defendant for damages in this kind of a case, and that they should therefore find for the defendant.

These prayers were too indefinite and uncertain to have been understood by the jury, and could not have guided them in rendering their verdict, and could not properly have been given.

The refusal of the court to give the propositions as asked is not therefore ground of exception, and it cannot be considered in this court.

The plaintiff's case was fully set out on the face of the eeclaration, and if the defendant below intended to question its liability to be sued in such an action it should have been taken by demurrer in *limine*; instead of which it pleaded "not guilty," and the first and only intimation of the defense indicated by these propositions was when they were presented at the close of the trial.

JURISDICTION.

These four so-called prayers are assumed by the plaintiff in error to present a "Federal Question."

The defendant in error denies that this court has jurisdiction of this case, the amount of the judgment below not exceeding $5,000, and moves the court to dismiss the writ of error.

The prayers in this case which the plaintiff in error assumes to justify the writ of error, under the second section of the act of Congress of March 25, 1885, entitled "An act Regulating Appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories," 23 Stats., L. 443, are precisely the same as those in the case of the District of Columbia *vs.* Gannan, No. 183.

The defendant in error adopts and relies upon the argument in that case upon the question of jurisdiction, as well as upon the question of the liability of the District for damages for negligence in case the jurisdiction shall be maintained.

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